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FEDERAL COMMUNICATIONS COMMISSION
OFFICE OF THE SECRETARY

Before The
FEDERAL COMMUNICATIONS COMMISSION
Washington, D.C. 20554

In re Applications of) MM Docket No. 99-153
)
READING BROADCASTING, INC.) File No. BRCT-940407KF
)
For Renewal of License of)
Station WTVE(TV), Channel 51)
Reading, Pennsylvania)
)
and)
)
ADAMS COMMUNICATIONS)
CORPORATION) File No. BPCT-940630KG
)
For Construction Permit for a New)
Television Station to Operate on)
Channel 51, Reading, Pennsylvania)

To: Magalie Roman Salas, Secretary
for direction to
The Honorable Richard L. Sippel
Administrative Law Judge

REQUEST FOR LEAVE TO APPEAL

1. Pursuant to Section 1.301 of the Commission's Rules, Adams Communications Corporation ("Adams") hereby requests leave to appeal the Presiding Judge's Memorandum Opinion and Order ("MO&O"), FCC 00M-07, released January 20, 2000 ^{1/}, to the limited

^{1/} By Order, FCC 00M-12, released February 3, 2000, the Presiding Judge extended to February 7, 2000 the date by which Adams could seek leave to appeal the MO&O. Adams's request for extension of that deadline was premised on the fact that by January 31, 2000 -- the original deadline -- Adams had not yet received the transcript of the testimony of Adams principal Howard N. Gilbert. As indicated in Adams's extension request, that transcript was expected to be available to Adams on January 31. However, the transcript was not in fact delivered (despite multiple telephoned inquiries to the reporting service) until February 2, immediately before undersigned counsel left for Reading for a full day of depositions (conducted on February 3).

W. J. Doyle, Jr. 046
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extent that, in the MO&O, the Presiding Judge added the following two issues:

To determine whether Adams Communications Corporation has abused the Commission's comparative renewal processes by the filing of a broadcast application for speculative and/or other improper purposes.

To determine whether such allegations of an abuse of process, if true, disqualify Adams Communications Corporation from receiving a Commission license.

As set forth below, the addition of those issues is completely unsupported by -- and is inconsistent with -- not only all available evidence, but also established Commission policy and precedent. Moreover, it is inconsistent with the Congressional policy supporting the maintenance of comparative renewal challenges (such as Adams's) filed prior to the Telecommunications Act of 1996.

A. The Language Of The Issues As Added Is Improperly Broad.

2. First, the very language of the added issues demonstrates their unsoundness.

The first issue is an "abuse of process" issue which contemplates inquiry into whether Adams "abused the Commission's comparative renewal processes". The issue as framed in the MO&O indicates that conduct falling within the potential scope of the term "abuse of process" would include "the filing of a broadcast application *for speculative and/or other improper* purposes." MO&O at 12 (emphasis added). But that scope is not supported by the precedent on which the MO&O is supposedly based or the allegations leading to the MO&O.

3. At Paragraph 21 of the MO&O, the sole case cited as "authority for an abuse of process issue" is *WWOR-TV, Inc.*, 7 FCC Rcd 636 (1992), *aff'd sub nom. Garden State Broadcasting Limited Partnership v. FCC*, 996 F.2d 386 (D.C. Cir. 1993). The *sole* basis for the abuse of process charge there was that the comparative renewal challenger had filed its application for the purpose of "reaching" or "achieving" a "settlement". See 7 FCC Rcd

at 637-641. Nothing in *WWOR-TV* suggests that the Commission intended to expand that very narrowly-focussed factual inquiry into the significantly broader inquiry which seems to be contemplated in the issue added by the Presiding Judge.

4. Adams acknowledges that *WWOR-TV* stands for the proposition that a comparative renewal challenger which files its application for the purpose of entering into a settlement may be deemed to have engaged in abuse of process. But the issue as cast in the MO&O seems to contemplate that "speculative" or unspecified "other" purposes may be deemed also to be improper and, therefore, a basis for disqualification. Adams does not know what those "speculative" or "other improper" purposes might be, and the MO&O provides absolutely no indication.^{2/}

5. As a matter of fundamental due process, parties forced to litigate a potentially disqualifying issue are entitled to know precisely the nature of the misconduct they are alleged to have committed. The MO&O falls far short of that basic protection. To the extent that the first added issue is intended to inquire into whether Adams filed its application for the purpose of achieving a settlement, the issue should say just that, without extending beyond the current limits of Commission precedent and the underlying factual allegations. But if the first added issue is intended to inquire into some other, as yet unspecified, type of conduct, such an expansion of previous precedent should be submitted to the Commission for its consideration *before* the parties to this hearing are required to litigate such an unprecedented and standardless issue.

^{2/} While Reading Broadcasting, Inc. ("RBI") had alleged, in its Motion to Enlarge Issues, that Adams had engaged in conduct which RBI viewed as abusive, the MO&O rejects those allegations. See MO&O at 5-8, ¶¶10-17. Thus, the only factual allegations not yet resolved appear to relate to the question of whether Adams filed its application for the purpose of entering into a settlement.

6. The second issue suffers similar problems. Under that issue Adams would be disqualified if "allegations of an abuse of process" are found to be "true". But the issue does not specify exactly what those particular "allegations" are. Again, due process requires much more definite language. In Adams's experience, conclusory issues such as this have historically been framed along the following lines:

To determine, in light of the evidence adduced pursuant to Issues [] through [], above, whether [the target applicant] is qualified to be a Commission licensee.

E.g., Hicks Broadcasting of Indiana, LLC, 13 FCC Rcd 10662 (1998); *Rainbow Broadcasting Company*, 1 FCC Rcd 1167 (1995); *Benchmark Communications Corporation*, 9 FCC Rcd 2319 (ASD 1994); *Community Communications Corporation*, 5 FCC Rcd 3413 (ASD 1990); *Rhys G. Mussman*, 3 FCC Rcd 6808 (CCB 1988). Framed in that way, the issue would properly and carefully focus the efforts of the parties, the Court, and any reviewing fora on the evidence which is adduced, and not on unspecified "allegations" of some "abuse of process". This is particularly important in view of the fact, noted above, that the MO&O's concept of "abuse of process" appears to be broader in some unspecified way(s) than that concept as articulated in the Commission precedent on which it relies.

B. Even If Interpreted Narrowly, The Added Issues Are Not Supported By The Record Or The Applicable Precedent.

7. Even if we assume that the added issues are directed to the limited claim that Adams's application was filed for the purpose of achieving a settlement ^{3/}, the issues are not supported here by the applicable precedent or the available evidence.

^{3/} That assumption is supported by the MO&O's exclusive reliance on *WWOR-TV*, where the Commission found an abuse of process when a challenging applicant filed for the purpose of achieving a settlement.

(1) The MO&O is based on an incorrect statement of Commission precedent.

8. Citing *WWOR-TV*, the MO&O asserts that in that case the Commission found the necessary [improper] intent from the fact that the same principals had realized a significant monetary settlement and therefore had become aware of the potential for gain through settlement without even discussing the subject.

MO&O at 10, ¶21. With all due respect, that seriously misstates the Commission's decision in *WWOR-TV*.

9. In *WWOR-TV*, the Commission specifically held that:

[W]e will not infer improper purpose in filing an application or pleading without a specific showing of improper motivation. [Citations and footnote omitted] In this regard, we find two factors especially probative as indications that [the challenging applicant] filed its application for the primary purpose of achieving a settlement. . . . First, we find that, in attempting to persuade the Commission that its application was not filed for the purpose of reaching a settlement, [the applicant] gave an account of its intent that was at best without credibility and at worst false and misleading. . . . Second, we find that the remaining evidence bearing on [the applicant's] purposes, especially that concerning [one of the applicant's principal's] intentions, does not demonstrate a primary interest in broadcast ownership.^{4/} Rather, the circumstances readily lend themselves to the conclusion that [that principal] was interested in receiving a settlement payoff. This is particularly so in light of the fact that the crucial meeting [of the applicant's principals] occurred almost immediately after these same three individuals received substantial payoffs from [an earlier settlement involving the same license]. ^{5/}

^{4/} According to testimony during the *WWOR-TV* proceeding, the principal referred to by the Commission here had stated, *inter alia*, that "just owning a television station, just buying a television station, to him, wasn't what he was looking for." 7 FCC Rcd at 641, ¶38.

^{5/} The "crucial meeting" was a meeting at which the challenging principals decided to undertake their challenge. That meeting was held only three weeks after the target incumbent licensee had commenced operation. At the initial hearing, the challenging principals and their attorney had claimed that the decision to pursue the second challenge was based largely on the observations of one principal (Ms. Wells) concerning the station's programming. However, all of those witnesses claimed that they could not recall the date of the "crucial meeting". On remand, the actual date of the meeting -- and its proximity to the commencement of the target station's operations -- was established. In light of the fact that that proximity substantially undermined the challenger's claims concerning its principal's supposed observations of the station's programming, and further in light of the fact that the documents establishing the date of the "crucial meeting" had been in the possession of, but withheld by, the challenging applicant, the Commission concluded that the challenger's story had been, at best, "grossly unreliable". 7 FCC Rcd at 641, ¶40.

WWOR-TV, 7 FCC Rcd at 638, ¶25.

10. So the MO&O is wrong when it asserts that *WWOR-TV* stands for the proposition that improper intent may be inferred solely from the existence of a prior monetary settlement. MO&O at 10, ¶21. Rather, the Commission in *WWOR-TV* went out of its way to emphasize that the Commission would **NOT** infer improper intent without a "specific showing of improper motivation", a showing which, in *WWOR-TV*, included clear indications of withholding evidence, unreliable testimony, and at least one statement by one of the challenging principals to the effect that "owning a television station. . . wasn't what he was looking for." See Paragraph 9, above. The totality of these considerations led the Commission to its conclusion in *WWOR-TV*.

11. There are no such considerations here.

12. The MO&O states that, "[s]oon after" receiving a settlement payment in the *Video 44* proceeding (involving a challenge for the license of Channel 44 in Chicago), Adams's principals turned their attention to home shopping programming. MO&O at 10, ¶21. Presumably this is intended to draw some parallel between the facts of this case and those of *WWOR-TV*. But in *WWOR-TV*, the decision to file the challenge was made less than a month after receipt of the settlement, and was made without apparent regard to the station's programming -- rather, the challengers chose simply to file a second challenge against a license which had already resulted in a pay-off to them.

13. Importantly, the Commission's emphasis on the "short lapse of time" (*see* MO&O at 10, ¶21) between the incumbent's commencement of programming and the challenger's decision to file was triggered by the fact that the challenger itself had initially claimed that it had decided to file its challenge after review of the station's programming.

Later, it was determined that the decision to file had been made at a meeting only three weeks after the target licensee had begun operation -- in other words, too soon to permit the review of programming which had been claimed. Moreover, the Commission found that the challenging applicant had withheld evidence which would have disclosed the date of the meeting in question.

14. These circumstances substantially undermined the challenger's credibility, leading to the conclusion that the challenger's story was, at best, completely unreliable, if not affirmatively misrepresentative. In other words, the primary importance of the "short lapse of time" was not that it, in and of itself, established improper intent; rather, viewed in the context of all the facts and circumstances (including the challenger's initial claims which were later discredited), the "short lapse of time" threw serious doubt on all of the challenger's claims.

15. Here, by contrast, Adams was not formed until November, 1993 -- more than a year after the Chicago settlement was signed and filed with the Commission, and approximately five months after all payments had been received. More importantly, as the Presiding Judge seems to acknowledge (MO&O at, *e.g.*, 10, ¶21), Adams targeted particular programming (*i.e.*, home shopping) and then sought out stations broadcasting such programming. This is in direct contrast to *WWOR-TV*, where the challengers targeted a particular license without apparent regard to the station's programming and only later claimed, misleadingly, that their primary concern had been in the station's programming.

16. Since the MO&O misstates and misapplies the Commission precedent on which it purports to be based, review of the MO&O by the Commission immediately is warranted to avoid substantial unnecessary waste of time and resources by the Presiding

Judge and all parties to this proceeding.

(2) *The MO&O is based on incorrect "factual" assertions.*

17. In addition to the misstatement of the applicable law, the MO&O includes a number of factual misstatements, many of which may arise from the fact that the Presiding Judge did not have the hearing transcript available when he prepared the MO&O.

18. For example, the MO&O states that "it can be inferred from Mr. Gilbert's testimony that Adams placed little or no reliance on its questionable ascertainment efforts". MO&O at 2-3, ¶5. This refers to an unsuccessful effort by Adams to tape and review approximately two weeks of WTVE programming, 24-hours per day, seven days per week.

19. It is not clear why the MO&O characterizes the taping as a "questionable" effort. Adams was attempting to obtain a record of the actual nature of RBI's programming, and around-the-clock taping for a significant period (*e.g.*, two weeks) can hardly be called a "questionable" way of achieving that goal.^{6/} Mr. Gilbert testified that the resulting tapes were made prior to the filing of the Adams application (Tr. 1068) and that Mr. Gilbert was briefed about the contents of those tapes on a daily basis (Tr. 1069). Additionally, Mr. Gilbert stated that he reviewed the tapes himself. Tr. 1088-89.

20. Pressed by the Presiding Judge, Mr. Gilbert was unable to state exactly when, during the review of the tapes, Adams decided to go forward with its application. Tr. 1088-90. That may be the source of the "inference" reflected in the MO&O.^{7/} But that ignores

^{6/} The fact that the effort was ultimately for naught because of a misunderstanding between Mr. Gilbert and the person in charge of making the tapes does not detract from the legitimacy of Adams's intent, which was to obtain a record of the station's programming.

^{7/} The MO&O does not include any references to specific portions of the transcript to which the Presiding Judge was referring.

Mr. Gilbert's testimony that he elected to watch all the tapes to see if "something different was going to pop up . . . You keep watching and watching to see if anything is different. And nothing was different." Tr. 1089. In other words, the taping project was intended to confirm the results of Adams's previously developed belief that Station WTVE(TV) was not serving the public. That belief had initially been developed when Adams determined that Station WTVE(TV) was airing home shopping, and had been confirmed by Mr. Gilbert during at least three trips to Reading, and a number of other trips to the Reading area but not necessarily to Reading itself. *E.g.*, Tr. 1046, 1061-62. The taping project was intended to provide further confirmation of the correctness of Adams's determination. According to Mr. Gilbert, the taping was "like belt and suspenders". Tr. 1088.

21. There is thus no basis for the Presiding Judge's inference itself. And the MO&O's statement concerning that inference ignores Mr. Gilbert's testimony concerning his own efforts, prior to the taping, to determine the level of programming service provided by the station to the Reading audience. Tr. 1046, 1061-62.

22. The MO&O also states that a "substantial question of fact" exists concerning whether Adams "has any intention of owning and operating a broadcast facility in the Reading community." MO&O at 3, ¶6. In support of this claim, the MO&O notes that:

- "Adams has no business plan." *Id.* But no business plan is required as part of the Commission's application process. Moreover, that process, and particularly the comparative renewal process, moves extremely slowly -- witness the fact that the *Video 44* proceeding was pending for more than a decade, and Adams's application here was filed some six years ago. Under these circumstances, the preparation of a formal "business plan" before the application is filed would be largely meaningless.
- "All of the principals of Adams are from Chicago and have no connections with Reading, Pa." *Id.* But again, there is no requirement that an applicant, or any of its principals, hail from the proposed community of license.

- Some of Adams's principals received payments from the *Video 44* settlement. *Id.* But as discussed above, the *Video 44* settlement is not probative of anything here.
- One Adams principal (A. R. Umans) stated in deposition that he had limited knowledge of Reading. But Mr. Umans owns less than 10% of Adams; by contrast, Mr. Gilbert and Robert Haag control, between them, substantially more than 50% of Adams. Mr. Gilbert testified that he and Mr. Haag spoke on a daily basis, and that in those conversations Mr. Gilbert kept Mr. Haag apprised of matters relating to the application. Tr. 1089-90.
- Mr. Haag "testified [in deposition] that he viewed the Reading challenge as a 'business opportunity' as did" two other Adams shareholders. MO&O at 3, ¶6. But any concern about such testimony is inconsistent with the Presiding Judge's expressed concern about the lack of a "business plan". If, as the Presiding Judge seems to say, Adams should have had a "business plan", how can it be bad that Adams's principals viewed the application as a "business opportunity"? And would not the term "business opportunity" in any event include the possibility of obtaining the license and operating the station?

23. The MO&O also asserts that "Mr. Gilbert admitted that the Adams group was not concerned with local public service broadcasting for Reading", MO&O at 4, ¶7, and that Adams "appears to have little or no interest in the Reading community's public service programming or in owning a station". MO&O at 9, ¶19. Those statements are flatly wrong. Mr. Gilbert testified that Adams is very concerned about the quality of public service broadcasting generally, and the deleterious effect of the home shopping format on the quality of such programming. *E.g.*, Tr. 1120-32. Adams's concern obviously includes Reading as well as all other markets nationwide.^{8/} Mr. Gilbert testified about his own visits to Reading, and his shock at his observation that Station WTVE(TV) was unknown to the

^{8/} The Presiding Judge asked Mr. Gilbert whether "you don't really have an interest in [public service broadcasting in Reading] as much as you have an interest in public broadcasting service, broadcasting in general." Tr. 1132. Mr. Gilbert answered in the affirmative. But that question and answer simply indicate that Adams's concern about home shopping programming includes, but is not limited to, Reading; it does *NOT* indicate that Adams "is not concerned with local public service broadcasting in Reading", as the MO&O inaccurately states.

people he spoke with there. Tr. 1090-91.

24. As far as Adams's desire to own a station is concerned, Adams has filed and is aggressively prosecuting ^{9/} its application for a construction permit for such a station. The MO&O's assertion that Adams appears to have little interest in owning a station is inconsistent with the facts.

25. The MO&O also suggests that Adams's willingness to pay \$3,300 to obtain an appraisal of the station may indicate some "movements towards or designs on a settlement". MO&O at 4-5, ¶8. But Mr. Gilbert testified in connection with that appraisal that Adams participated only to find out what the station might be worth. Mr. Gilbert repeatedly and expressly denied that Adams's participation in the appraisal was in any way related to any interest on Adams's part to enter into any settlement with anyone. Tr. 1099-1107. While Mr. Gilbert did acknowledge that the other entities contributing to the appraisal may have had some possible settlement in mind, he emphasized that Adams did not, and that Adams did not view its participation in the appraisal to have entailed any settlement discussions at all. Tr. 1106. In light of that testimony, the MO&O's suggestion to the contrary has no basis at all.

26. The MO&O also purports to find possible evidence of Adams's 1994 intent in a 1999 letter reflecting fee arrangements between Adams and its counsel. While the terms of the retainer agreement would not, in undersigned counsel's experience, ordinarily motivate Adams to embrace any particular course of action (*e.g.*, settlement), we do not even need to

^{9/} Adams's prosecution efforts have included not only filing its application, but also filing three petitions for mandamus to prod the Commission into processing that application, as well as several motions to enlarge directed to the basic qualifications of RBI, one of which was granted. This is in sharp contrast to *WWOR-TV*, where the challenging applicant's prosecution efforts were largely directed to defending itself against charges of abuse of process.

reach that question, since Mr. Gilbert testified that Adams and its counsel did not have a specific fee arrangement at the beginning of their relationship. Tr. 1020-21. That being the case, the details of a letter written five years after the filing of Adams's application cannot be deemed probative of Adams's intent when it filed its application in 1994. ^{10/}

C. Conclusion

27. The Commission does not, absent some very substantial basis, infer that an applicant filed for the purpose of achieving settlement. *WWOR-TV, supra*. In *WWOR-TV*, the challenging applicant was found to have withheld important documentation and information which undermined its claims concerning the purpose of its application. Here there is no such basis for questioning Adams's repeated and unequivocal assertion that Adams did not file for the purpose of achieving any settlement.

28. As Mr. Gilbert repeatedly testified, Adams's goal is to increase the level of available public service broadcasting -- in Reading and elsewhere -- by challenging the public service performance of Station WTVE(TV), the home shopping station in Reading. If Adams's challenge is successful, the deficient performance of RBI will be replaced by Adams's own performance. That is exactly why Congress established the comparative renewal process: to provide a mechanism by which optimal public service performance might be achieved in the broadcast industry. *See, e.g., Comparative Hearings Involving Renewal*

^{10/} Additionally, the MO&O misreads the 1999 fee arrangement letter to state that Bechtel & Cole "is assured that it will be paid its hourly rate regardless of the outcome" of the case. MO&O at 10, ¶22. In fact, the letter provides that the firm will charge Adams at a substantially reduced hourly rate (\$125 per hour, rather than \$225). If the Adams application is dismissed, denied or unsuccessful, that substantially reduced rate will not be adjusted.

Applicants, 22 FCC2d 424, 18 R.R.2d 1901 (1970). ^{11/} To suggest, as the MO&O appears to, that an applicant seeking to improve the quality of public service broadcasting should be presumed to be interested in settlement runs directly counter to Congressional intent. ^{12/}

29. That apparent presumption is unfortunately consistent with the Commission's historical bias against comparative renewal challengers. *See, e.g., Central Florida Enterprises, Inc. v. FCC*, 598 F.2d 37, 44 R.R.2d 345, 360 (D.C. Cir. 1982) ("the Commission dislikes the idea of comparative renewal proceedings altogether"). Instances of disparate treatment in this proceeding do nothing to dispel Adams's concern that such bias may still be extant. ^{13/} Notwithstanding this concern, Adams intends to continue to

^{11/} While Congress has since eliminated the comparative renewal process for future purposes, it specifically left in place the few comparative renewal proceedings (including the instant proceeding) pending as of the date the policy was eliminated.

^{12/} The MO&O contains the following statement attributed (without citation) to Mr. Gilbert:

[T]he opportunity to effect a change of policy *vis à vis* home shopping programming was of paramount concern to the Adams principals which might make the amount of a settlement secondary.


MO&O at 11, ¶23. Since Mr. Gilbert repeatedly testified that Adams was not interested in settlement, it is not at all clear what the statement attributed to him means (or, for that matter, where it comes from). The MO&O states, in a footnote to the sentence following the sentence quoted above, that a supposed question about some "nexus between settlement and the filing of an application in 1994" is "not a speculative inquiry" (MO&O at 11, n. 12). But that is clearly wrong. There is absolutely no basis for any claim that Adams filed its application for the purpose of achieving a settlement. Instead, the notion of possible settlement is pure speculation, speculation which has been repeatedly and consistently denied by Adams in both its words (*e.g.*, through Mr. Gilbert's testimony) and its actions (*e.g.*, through its summary rejection of settlement overtures made by RBI).

^{13/} Adams is particularly concerned about the willingness of the Presiding Judge to add a disqualifying issue against Adams based on nothing more than speculation, while declining to add issues against RBI where the *documentary* record clearly establishes serious questions of potential misconduct by RBI. For example, it was not until November, 1999 that RBI acknowledged that Micheal Parker had obtained RBI stock in October, 1991; for more than seven years prior to that disclosure, RBI had repeatedly misrepresented to the Commission *and*, as recently as July, 1999, to the Presiding Judge, that Parker had not acquired his shares until March, 1992, only after approval of a long-form transfer of control application.

prosecute its application to a successful conclusion, whether that favorable result is achieved before the Presiding Judge, the Commission, or the courts. ^{14/}

WHEREFORE, for the reasons set forth above, Adams Communications Corporation requests leave to appeal the MO&O to the extent described above or, at a minimum, modification of the *MO&O* consistent with the foregoing.

Respectfully submitted,


 /s/ Harry F. Cole
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February 7, 2000

^{14/} In the event that the Presiding Judge harbors any on-going concerns about the possibility that, notwithstanding its unqualified denials, Adams may be inclined to dismiss its application in return for some payment, Adams invites the Presiding Judge to order that Adams be prohibited from entering into any such settlement arrangement. Of course, the Presiding Judge (or the Commission) in any event retains the authority to prevent any such settlement simply by refusing to approve any settlement which might be presented to him.


CERTIFICATE OF SERVICE

I hereby certify that, on this 7th day of February, 2000, I caused copies of the foregoing "Request for Leave to Appeal" to be hand delivered (as indicated below), addressed to the following:

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